

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original & Affidavit of Mailing

77-1116

To be argued by
RICHARD S. BERNE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1116

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN McCLEAN and RAMON VIERA,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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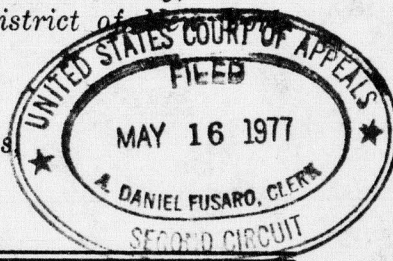




TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
ARGUMENT:	
The District Court Correctly Held That It Lacked Jurisdiction To Entertain Appellants' Motion For Reconsideration Of The Decision Of June 30, 1976, Reducing Their Sentences	4
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:

<i>Grasso v. Norton</i> , 520 F.2d 27 (2d Cir. 1975)	7
<i>Kortness v. United States</i> , 514 F.2d 167 (8th Cir. 1975)	5
<i>Roselli v. United States</i> , 421 U.S. 962 (1975)	6
<i>United States v. Ellenbogen</i> , 390 F.2d 537 (2d Cir.), cert. denied, 393 U.S. 918 (1968)	5
<i>United States v. Kahane</i> , 527 F.2d 491 (2d Cir. 1975)	5
<i>United States v. McClean</i> , 528 F.2d 1250 (2d Cir. 1976)	2
<i>United States v. Manderville</i> , 396 F. Supp. 1244 (D. Conn. 1975)	6
<i>United States v. Mehrtens</i> , 494 F.2d 1172 (5th Cir. 1974), cert. denied, 419 U.S. 900 (1974)	5
<i>United States v. Regan</i> , 503 F.2d 234 (8th Cir. 1974)	5

	PAGE
<i>United States v. Slutsky</i> , 514 F.2d 1222 (2d Cir. 1975)	7, 8
<i>United States v. United States District Court, Central District of California</i> , 509 F.2d 1352 (9th Cir.), cert. denied sub nom. <i>Roselli v. United States</i> , 421 U.S. 962 (1975)	6
<i>United States v. Wigoda</i> , 417 F. Supp. 276 (N.D. Ill. 1976)	7
 <i>Statutes:</i>	
28 U.S.C. § 2255	5
 <i>Rules:</i>	
Federal Rules of Criminal Procedure, Rule 35..	4, 5, 6, 7
General Rules of the United States District Court for the Southern and Eastern Districts of New York, Rule 9(M)	5
 <i>Regulations:</i>	
28 C.F.R. § 2.14(e)	8
28 C.F.R. § 2.20	7

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FOR THE SECOND CIRCUIT

Docket No. 77-1116

UNITED STATES OF AMERICA,

—against—

Appellee,

JOHN MCCLEAN and RAMON VIERA,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

John McClean and Ramon Viera appeal from an order of the United States District Court for the Eastern District of New York (Jack B. Weinstein, J.) entered on January 31, 1977. The order denied appellants' motion for reconsideration of the district court's decision of June 30, 1976, reducing appellants' sentences from nine years to four years and for a further reduction in sentence. The district court denied the motion upon the ground that it lacked the power to entertain it.

Appellants, who are now in custody, received their sentences after they and co-defendant Edward Codelia were convicted, after a jury trial before Judge Weinstein,

on six counts of a seven count indictment which charged them with violations of the federal civil rights laws (18 U.S.C. § 242), related conspiracy (18 U.S.C. § 371) and illegal wiretapping (18 U.S.C. §§ 2511(1) and (2)). The sentences were imposed under 18 U.S.C. § 4208(a)(2).¹

Statement of Facts

A full statement of the underlying facts in the case is contained in *United States v. McClean*, 528 F.2d 1250 (2d Cir. 1976). As set forth therein and noted above, appellants, while police officers, were convicted of depriving certain individuals of their civil rights by unlawfully taking money and property from them without due process, 18 U.S.C. § 242 (three counts), conspiracy to do so, 18 U.S.C. § 371 (one count), and illegal wiretapping, 18 U.S.C. §§ 2511(1)(a) and (2) (two counts). Each appellant was fined \$10,000 and given consecutive sentences totalling nine years. Upon appeal to this Court, the convictions were affirmed; the mandate was issued on February 4, 1976. *United States v. McClean*, *supra*, 528 F.2d 1250.

On May 5, 1976, appellants filed a timely motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. On June 30, 1976, Judge Weinstein granted appellants' motion and reduced the sentences of McClean and Viera each to a fine of \$10,000 and a total of four years imprisonment, still under 18 U.S.C. § 4208(a)(2)(A).²

¹ That section is now 18 U.S.C. § 4205(b)(2).

² References preceded by the letter "A" are to pages of appellants' appendix.

Appellants began serving their sentences at the end of June, 1976 (A. 6). After conducting a hearing on the case in October of 1976, the local Parole Board in Texas, where appellants are incarcerated, recommended that each appellant be paroled on March 2, 1977 (A. 6). In November of 1976, the United States Parole Commission in Washington, D.C. reversed the decision of the local Board as contrary to the Commission's Guidelines for adult cases. The Commission pointed out that under the Guidelines, appellants, who each had a very good salient factor score but who had been convicted of very high severity offenses (A. 8-9), could normally be expected to be released on parole after serving between 26 and 36 months of their sentences. The Commission continued appellants' cases to the ^{one} ~~non~~-third point (16 months) of their maximum sentences (four years) for reconsideration (A. 11-12).

On January 26, 1977, appellants filed a motion asking the district court to reconsider its order of June 30, 1976 reducing their sentences from nine years to four years and seeking further reduction in the sentences. In support of the motion, appellants contended that the district court's alleged intention to reduce the time to be served by appellants had been frustrated by the Commission (A. 4-7). As noted above, the court denied the motion on the ground that it lacked the power to entertain it (A. 1). This appeal followed.

ARGUMENT

The District Court Correctly Held That It Lacked Jurisdiction To Entertain Appellants' Motion For Reconsideration Of The Decision Of June 30, 1976, Reducing Their Sentences.

On appeal, appellants argue that the district court erred in denying their motion for reconsideration. They contend that where the intent of a judge in reducing a sentence has allegedly been "frustrated" by what is termed "the Parole Commission's rigid adherence to its Guidelines," the court has the power to reconsider its prior action and to reduce the sentence even further, even where the motion for reconsideration is untimely made under Rule 35 (Brief, at 4-5). We disagree. We believe that the plain language of Rule 35 and the relevant case law make it very clear that a district court lacks jurisdiction to entertain either a Rule 35 motion or a motion to reconsider a prior ruling on a Rule 35 motion, where the motion is not made within the time period set forth in the Rule. We submit that here appellants' motion was untimely made, whether it is viewed as a subsequent Rule 35 motion or as a motion to reconsider Judge Weinstein's order of June 30, 1976.

Rule 35 provides in part as follows:

The Court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 day after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. . . .

Since there is no claim that appellants received illegal sentences or that their sentences were imposed in an illegal manner, the portion of the Rule relevant to the case is found in the second sentence quoted above. Where there is no Supreme Court action, a motion to reduce sentence must be made within 120 days of the issuance of the mandate. It is undisputed that here appellants' January 27, 1977, motion for reconsideration was filed well over 120 days after the issuance of the mandate on February 4, 1976. And, in *United States v. Kahane*, 527 F.2d 491 (2d Cir. 1975), this Court squarely held that a district court lacks the power to entertain a Rule 35 motion made more than 120 days after sentencing. See also, *United States v. Ellenbogen*, 390 F.2d 537 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968); *United States v. Regan*, 503 F.2d 234 (8th Cir. 1974); *United States v. Mehrrens*, 494 F.2d 1172 (5th Cir. 1974), *cert. denied*, 419 U.S. 900 (1974).³

Indeed, as stated above, it is clear that appellants' motion was untimely, whether it is treated as a subsequent Rule 35 motion, *United States v. Kahane*, *supra*, or as a motion to reconsider Judge Weinstein's decision of June 30, 1976. In the first place, Rule 9(M) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York provides that a notice of motion for reargument must be served within ten days after the court's determination of the original motion. Clearly, that was not done here.

³ Appellants concede that a subsequent Rule 35 motion for reduction of sentence may not be made later than 120 days following the issuance of the mandate from the court of appeals, a period of time that had unquestionably expired when the subject motion was made. Appellants further state that such a motion may be made under 28 U.S.C. § 2255. However, appellants have never made an application under that section or requested that the subject motion be treated as such. *Cf. Kortness v. United States*, 514 F.2d 167 (8th Cir. 1975).

Secondly, this very issue was decided by the Ninth Circuit Court of Appeals in *United States v. United States District Court, Central District of California*, 509 F.2d 1352 (9th Cir.), *cert. denied sub nom. Roselli v. United States*, 421 U.S. 962 (1975). In that case, the Ninth Circuit granted the government's petition for a writ of mandamus and vacated the district court's order reducing a sentence following a motion to clarify an original Rule 35 motion filed and decided nearly two years earlier, or in the alternative to further reduce the previously reduced sentence. In so ruling, the court stated (509 F.2d 1356):

. . . The challenged court order here was entered more than three years after expiration of the original 120 days period and was made pursuant to a second motion to reduce sentence, a motion totally new and separate from the original one which had been filed and acted upon several years earlier. Friedman's [second motion] cannot relate back to his original timely motion to reduce sentence, and the court . . . lacked power to consider the new motion.

Even if the second motion was, as Friedman contends, merely one for clarification of the first order or even if the district court . . . purported to "retain jurisdiction" over the sentence, the court's action . . . cannot be upheld. To rule otherwise would all but nullify the 120 day time limit and would undermine completely the purpose of Rule 35 which was enacted, in part, to limit the period over which the district court has discretionary control over its own sentences. See Original Committee Note to Rule 35.

We note that *United States v. Manderville*, 396 F. Supp. 1244 (D. Conn. 1975); *United States v. Wigoda*,

417 F. Supp. 276 (N.D. Ill. 1976), and *United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975), cases cited by appellants for the proposition that Rule 35 relief is appropriate when a court's sentencing intent has been "frustrated" by the Parole Commission's Guidelines, all involved situation where Rule 35 motions were *timely* filed.

In short, the law is clear that where a motion under Rule 35 or a motion to reconsider a prior Rule 35 motion is untimely made, the district court lacks the power to entertain the motion.

Appellants have attempted to bolster their argument by asserting that Judge Weinstein's original intent in reducing their sentences was "frustrated" by the Parole Commission's alleged adherence to the Guidelines. They base the claim on the fact that in light of their salient factor score of "very good" and the "very high" severity for their offense (A. 8-12), the Guidelines indicate, in the case of *both* a four and a nine year sentence, a range of 26-36 months to be served before release. Hence, appellants contend, they are no better off than they were before their sentences were reduced.

As argued above, we believe that the district court was correct in ruling that it lacked jurisdiction to entertain appellant's motion, without reaching the substance of the motion. We also submit, however, that it is clear from the record that appellants' claims of frustration of judicial intent are without merit.

To begin with, appellants' sentences were reduced by Judge Weinstein on June 30, 1976, well over two years after the promulgation of the Guidelines (See 28 C.F.R. § 2.20, effective November 19, 1973). Thus, and particularly in light of cases in this Circuit, *United States v. Slutsky*, *supra*, 514 F.2d 1222; *Grasso v. Norton*, 520

F.2d 27 (2d Cir. 1975), there is little basis for arguing that Judge Weinstein was unaware of the Guidelines when he reduced appellants' sentences in June of 1976. Cf. *United States v. Slutsky, supra*. Secondly, appellants are better off than before their sentences were reduced. Under the order of the Parole Commission they are to receive an in-person hearing at the one-third point of their maximum sentence. In light of Judge Weinstein's reduction, that hearing will come at 16 months, certainly much sooner than if appellant's sentences were still 9 years. 28 C.F.R. § 2.14(e). Finally, the unalterable fact remains that the maximum term which appellants could be required to serve for a very serious offense has been reduced by more than half. Under all of these circumstances, we fail to see how it can be argued that Judge Weinstein's intent has been frustrated.

CONCLUSION

The order of the district court should be affirmed.

Dated: Brooklyn, New York
May 11, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

BARBARA ALLEN

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 13 day of May 1977 he served a copy of the within
Briefs of Appellee

by placing the same in a properly postpaid franked envelope addressed to:
Patrick M. Wall, 36 West 44th St., N.Y. C. 10036

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County
of Kings, City of New York.

Barbara Allen

Sworn to before me this

13th day of May 1977
Carolyn D. Johnson

NOTARY PUBLIC, State of New York
No. 41-6618

Qualified in Queens County
Term Expires March 30, 1980